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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TOMMY A. GRANT,

Plaintiff and Appellant,

v.

KIZY PROPERTIES, INC.,

Defendant and Respondent.

D041958, D042188

(Super. Ct. No. GIC772544)

APPEALS from a judgment of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed in part; reversed in part.

Tommy A. Grant sued Sabiha Kizy (Sabiha) for personal injury. Grant amended his complaint to add Kizy Properties, Inc. (Kizy), as a defendant. Sabiha answered, Kizy did not. A default was entered against Kizy. Kizy's motion to set aside the default was denied. At the prove-up hearing the trial court refused to enter judgment against Kizy, finding Grant had failed to establish Kizy's liability. Kizy appeals the denial of its motion. Grant appeals the trial court's refusal to enter a default judgment.

BACKGROUND

On August 14, 2001, Grant filed a complaint, alleging causes of action for negligence and premises liability as to Sabiha, Hilltop Liquor Store and Doe defendants and causes of action for assault and battery as to Jose Nava. The complaint alleged Sabiha was the owner and operator of Hilltop Liquor Store (the liquor store). The complaint asserted that on August 16, 2000, while Grant was at the liquor store, he was assaulted by Nava and seriously injured.

On February 13, 2002, Sabiha answered the complaint.

On March 8, 2002, Grant amended the negligence and premises liability causes of action to identify Kizy as a defendant. The amended complaint was served on Kizy but it did not answer. A request for default was filed. A copy of the request was served by mail on Kizy at the liquor store address and on the attorney representing Sabiha.

Kizy filed a motion asking the entry of default be set aside. By declaration Sabiha asserted that on September 23, 2001, she transferred title in the building housing the liquor store to Kizy, a corporation owned by Sabiha and her son, Jassam Kizy (Sam). Sabiha by declaration stated that when sued by Grant, she tendered her defense to her insurance carrier, Golden Eagle Insurance (Golden Eagle). Sabiha stated in her declaration that when Kizy was added as a defendant, Sam contacted the attorney representing Sabiha and counsel stated she "thought" Golden Eagle would also defend Kizy. No answer was filed. Sabiha's declaration states neither she nor Sam received notice of the request to enter default. Six weeks after the filing of the request for default, Golden Eagle informed Kizy it would not defend it in the Grant action. Kizy secured

counsel and filed the motion to set aside the entry of default. Based on these assertions of fact, Kizy argued it should be relieved from default because of Golden Eagle's neglect and the service of summons on Kizy was defective.

In a declaration appended to his opposition to the request to set aside default, Grant's counsel asserted the following chronology of events: After Sabiha was served with the complaint, no answer was filed and a request for entry of default was made. Later, by stipulation Grant agreed to set aside the default. When Sabiha's counsel indicated the liquor store was housed in a building owned by Kizy, the complaint was amended to name Kizy as a defendant. Grant's counsel at that time made clear he understood Sabiha's position to be that at the time Grant was assaulted, Kizy was the owner of the building housing the liquor store. Neither Sabiha nor counsel did anything to contradict this understanding and did not state the date on which Kizy acquired ownership. Grant's counsel conceded all formal inquiries and responses concerning ownership of the building were couched in the present tense.

In light of this understanding, Grant's counsel amended the complaint to include Kizy as a defendant. When Kizy filed no answer to the complaint, Grant requested entry of default against Kizy. In June 2002 Sabiha moved for summary judgment. That motion was denied on July 19, 2002. At a settlement conference Grant's counsel attempted to have Kizy participate in the negotiations. Sabiha's counsel stated she did not represent Kizy and that negotiations concerned Sabiha's personal liability and not that of the corporation. Ultimately, a settlement was reached by which Sabiha obtained a release of her personal liability. Grant reserved the right to proceed against Kizy.

On August 21, 2002, Grant filed a request for judgment as to Kizy and set a date for a prove-up hearing. The next day, Grant's counsel was contacted by an attorney representing Kizy. Kizy's attorney informed him Kizy did not own the building housing the liquor store at the time of the assault. Grant's counsel replied this was not the position taken by Sabiha during the defense of the case against her. Grant's counsel stated he could not agree to the default being set aside.

The trial court denied the motion to set aside the default. It found Kizy had failed to establish excusable neglect. The trial court found Kizy had received service of the complaint and Sabiha's reliance on the equivocal statement of her attorney that Golden Eagle would defend Kizy was unreasonable. The court found, in any case, Sabiha was aware for a lengthy period Golden Eagle had taken no action to defend Kizy and still she did nothing until after the case against her was settled. The court also concluded Grant had substantially complied with the requirements for giving Kizy notice of the lawsuit.¹

Grant then sought a judgment in default. After a hearing on the matter, the trial court concluded Grant had failed to establish Kizy was liable and refused to enter a default judgment. The court entered judgment against Nava in the amount of \$149,750.83.

¹ The trial court concluded the settlement between Sabiha and Grant was in good faith. The court noted the settlement was for \$30,000 and this was a fair amount in light of Grant's total damages and Sabiha's percentage of liability. The court found no harm to Grant in the transfer of ownership from Sabiha to Kizy.

Kizy and Grant appeal from the default judgment. Kizy argues the trial court erred in denying its motion motion to set aside the default, Grant argues the trial court erred in refusing to enter a default judgment against Kizy.

DISCUSSION

A. Denial of Default Judgment

Grant argues the trial court erred in denying him a default judgment.

1. Law

After entry of default, a plaintiff may seek a default judgment in one of two ways. If the action is one arising from contract or judgment and the damages sought are in a fixed or determinable amount, the clerk on application may enter judgment without a hearing and without judicial action. (Code Civ. Proc., § 585, subd. (a).) In all other cases, the court may enter a default judgment after it is "proved up." (Code Civ. Proc., § 585, subd. (b).) This was a personal injury case and it was necessary any default judgment be entered by the court.

Strangely, given the lengthy years of its application, the law applicable to the entry of default judgments is not clear in all its aspects. The failure to answer and the entry of a default has several effects. "The entry of a default terminates a defendant's rights to take any further affirmative steps in the litigation until either its default is set aside or a default judgment is entered. [Citations.]" (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 385.)

By allowing a default to be entered, a defendant admits the truth of all well-pleaded material allegations in the complaint.² (*Molen v. Friedman* (1998) 64 Cal.App.4th 1149, 1153; *Martin v. General Finance Co.* (1966) 239 Cal.App.2d 438, 443.)³ There is some authority suggesting if the complaint fails to state a cause of action or the allegations do not support the demand for relief, then the plaintiff is not entitled to a default judgment. However, other cases state a default judgment may be entered when the court had jurisdiction of the parties and the subject matter and the defective complaint was sufficient to apprise the defendant of the nature of the plaintiff's demand. (See *Molen v. Friedman, supra*, 64 Cal.App.4th at pp. 1153-1154 and cases cited therein.)

For the purposes of this case we will apply the rule that a nonanswering defendant admits only well-pleaded material allegations in the complaint, and if those allegations fail to state a cause of action, then no default judgment may be entered. We understand the law to be that if the complaint properly states a cause of action, then the only additional proof required for the judgment is that establishing the amount of damages. (See *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1597; *Hennefer v. Butcher* (1986) 182 Cal.App.3d 492, 504-505.)

² "A well-pleaded complaint is an original or initial claim that sufficiently sets forth a claim for relief, by including the grounds for the court jurisdiction, the basis for the relief claimed, and a demand for judgment, so that a defendant may draft an answer that is truly responsive on the issues to be decided." (Garner, Dict. of Modern Legal Usage (2d ed. 1995) p. 927.)

³ In the California Judges Benchbook, Civil Proceedings Before Trial, section 16.33, page 894, the authors state: "The allegations of the complaint are not deemed admitted by the default." This is not a correct statement of the law.

2. Analysis

The court's formal ruling in denying Grant a default judgment against Kizy merely states Grant had not sustained its burden of establishing liability on the part of Kizy. It is clear from a review of the "prove up" hearing the trial court believed Grant could not recover against Kizy since evidence presented at the hearing on the motion to set aside the default established Kizy did not own the building housing the liquor store on the date of the assault, and, thus, could not be liable under Grant's causes of action for negligence and premises liability.

Premises liability is a form of negligence. (*Brooks v. Eugene Burger Management Corp.* (1989) 215 Cal.App.3d 1611, 1619.) In order to be liable on a premises liability theory, it is not necessary the defendant owned the property. It is only necessary the defendant controlled the property. (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162.)

The complaint alleged Sabiha and Kizy were at all times mentioned in the complaint "owners" of and were "responsible for" the operation of the liquor store. The complaint alleged that at the time of the assault, Sabiha and Kizy "owned, maintained, controlled, managed, and operated" the liquor store. The complaint alleged that at all times each of the defendants was the agent of the other and in all respects relevant to the complaint were operating in the scope of that agency.

By failing to answer the complaint, Kizy admitted each of these allegations. The complaint alleged sufficient causes of action for negligence and premises liability. Thus, the trial court erred in denying Grant a default judgment against Kizy.

B. Motion to Set Aside Entry of Default

Kizy argues the trial court erred when it denied its motion to set aside the default.

1. Background

Grant's complaint was filed on August 14, 2001. Sabiha did not answer and Grant filed a request for entry of default. Later, by stipulation Grant agreed to set aside the default and Sabiha answered.

On March 8, 2002, the complaint was amended to add Kizy as a defendant. The amended complaint was served on Kizy on April 4, 2002. On May 13, 2002, Grant's counsel sent a letter to Sabiha's attorney asking if her firm would be representing Kizy. There was no response.

In her declaration attached to the motion to set aside the default, Sabiha stated that as soon as Kizy was served with the amended complaint, Sam contacted her attorney. Sabiha states Sam told her the attorney "thought" Golden Eagle would also defend Kizy. Sabiha stated based on this representation she believed Kizy would be provided a defense by Golden Eagle. However, no responsive pleading was filed for Kizy.(JA I 42-43)!

On May 22, 2002, Grant filed a request for entry of default against Kizy. The request for default contains a declaration of mailing indicating it was mailed to Kizy at the liquor store address and to Sabiha's counsel.

In June 2002 Sabiha moved for summary judgment. The motion was denied on July 19, 2002.

On July 2, 2002, Sabiha received a letter from her attorney that Golden Eagle would not provide Kizy a defense.

On July 26, 2002, a settlement conference was held. Sabiha's counsel and a Golden Eagle representative were present. Neither Sabiha nor any representative of Kizy was present. Grant's counsel noted the default against Kizy and stated his desire that Kizy participate in the settlement. Sabiha's attorney stated Golden Eagle was not representing or indemnifying Kizy. A settlement was reached as to Sabiha and on August 21, 2002. Grant's counsel provided a request for dismissal as to Sabiha.

After being informed on July 2, 2002, Golden Eagle would not defend Kizy, Sam, over a two-week period, attempted to get the insurance company to change its position. Sabiha's attorney provided Sam with the names of three attorneys. Sam talked to each of them sequentially. Each wanted to see all the documents related to the case and each required two weeks to review them. On August 22, 2002, Gary Brenner agreed to represent Kizy.

On August 22, 2002, Brenner contacted Grant's counsel and informed him he was representing Kizy. On September 12, 2002, Kizy moved for an order setting aside the default.

The trial court denied the motion, finding that Kizy had not established excusable neglect and had failed to file an answer as required by Code of Civil Procedure section 473, subdivision (b), and that while the motion was brought within six months, it was not brought within a reasonable time.

More specifically, the court found Sabiha learned of the entry of default from her attorney between May 2002 and September 2002. She knew in early July 2002 Golden Eagle would not provide Kizy a defense. Nothing was done to address the default until

August, after the request for dismissal as to Sabiha was provided to her attorney. The motion to set aside default was filed on September 12, 2002, four months after its entry.

The trial court stated: "Even if [Sabiha and Sam's] reliance on the equivocal statement of [her counsel] in May 2002 [i.e., that counsel thought Golden Eagle would defend Kizy] was reasonable (and it was not), they did nothing once they learned that Golden Eagle would not provide a defense, despite the active nature of the litigation until the case had finally settled as to Sabiha's personal liability."

2. Law

Pursuant to section Code of Civil Procedure 473, subdivision (b), a court may relieve a party from the entry of default taken against the party "through his or her mistake, inadvertence, surprise or excusable neglect." The section requires application for such relief be made within a reasonable time and in no case more than six months after the entry of default.

A motion for relief is addressed to the sound discretion of the trial court and an exercise of such discretion will not be disturbed on appeal absent a showing of abuse. The statute, however, is remedial and should be liberally construed to carry out the policy of permitting trial on the merits. Nonetheless, the moving party has the burden of showing good cause. (*Stafford v. Mach* (1998) 64 Cal.App.4th 1174, 1180; *Davis v. Thayer* (1980) 113 Cal.App.3d 892, 904.)

To gain relief, the defaulting party must show reasonable diligence. "[T]he acts which brought about the default must have been the acts of a reasonably prudent person

under the same circumstances." (*Jackson v. Bank of America* (1983) 141 Cal.App.3d 55, 58.)

3. Analysis

The trial court was greatly troubled by the behavior of Kizy, Sabiha and Sabiha's counsel. Shortly after she was sued, Sabiha moved ownership of the building housing the liquor store from herself to Kizy. Sabiha had to seek relief from her own default. Kizy's failure to answer the amended complaint was explained by Sabiha and Sam's claimed reliance on the statement of Sabiha's lawyer that she "thought" Golden Eagle would represent Kizy. As the trial court noted, the litigation was active but neither Sabiha nor Sam noted that no answer was filed for Kizy. Sabiha and Sam's explanation for why Kizy did not seek more timely relief from default was they never received notice of entry of default even though it was mailed to them and to Sabiha's attorney. Sabiha and Sam explained the lengthy delay in retaining counsel for Kizy after they learned Sabiha's insurance carrier would not defend the corporation by stating that weeks were spent in attempting to get the insurance company to represent Kizy and then in talking in turn to three different attorneys. One day after Sabiha secured a release of her personal liability, counsel for Kizy contacted Grant's counsel seeking a stipulated relief from default.

The trial court did not abuse its discretion in denying Kizy relief from default. Sabiha and Kizy's whole approach to the case was dilatory if not manipulative. As the trial court found, Sabiha's reliance on the statement of counsel that she thought Golden Eagle would represent Kizy was unreasonable. Contrary to Kizy's argument, the present case is not controlled by *Rogalski v. Nabers Cadillac* (1992) 11 Cal.App.4th 816, 818-

821. In *Rogalski* the insurance company first told the defendant it would provide a defense and then did not notify the defendant when the decision was made not to do so. The amount of time necessary for Kizy to secure counsel demonstrates a lack of reasonable diligence. Kizy failed to demonstrate excusable neglect.

The order denying Kizy relief from default is affirmed. The judgment denying Grant a default judgment is reversed. The matter is remanded to the trial court to enter such a judgment. Grant is to recover costs on appeal.

BENKE, Acting P. J.

WE CONCUR:

McDONALD, J.

O'ROURKE, J.